

1513994 (Migration) [2017] AATA 3036 (19 December 2017)

DECISION RECORD

DIVISION:	Migration & Refugee Division
CASE NUMBER:	1513994
MEMBER:	Justine Clarke
DATE:	19 December 2017
PLACE OF DECISION:	Melbourne
DECISION:	The Tribunal remits the application for a Partner (Residence) (Class BS) visa for reconsideration, with the direction that the applicant meets the following criteria for a Subclass 801 visa: • cl.801.221(6)(b) and (c) of Schedule 2 to the Regulations.

Statement made on 19 December 2017 at 5:17pm

CATCHWORDS

Migration – Partner (Residence) (Class BS) visa – Subclass 801 (Spouse) – Credible witness – Health issues and treatment – Pooled finances – Lived together – Psychologist and social worker's evidence

LEGISLATION

Migration Act 1958, ss 5F, 65, 359A, 376

Migration Regulations 1994, rr 1.15A, 1.21-1.25, Schedule 2 cl 801.221

CASES

Dang v Minister for Immigration [2016] FCCA 1426

Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 378 of the Migration Act 1958 and replaced with generic information.

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration [in] September 2015 to refuse to grant the applicant a Partner (Residence) (Class BS) visa under s.65 of the *Migration Act 1958* (the Act).
2. The visa [applicant] is [an age] year old national of Vietnam.
3. [In] October 2012, [the visa applicant] applied for the visa on the basis of her relationship with her sponsor, [Mr A], who is [an age] year old Australian citizen. At the time of application, Class BS contained Subclass 801. The criteria for the grant of this visa are set out in Part 801 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria include cl.801.221. Clause 801.221(1) requires that, at the time of decision, the applicant meets the requirements of subclause (2), (2A), (3), (4), (5), (6) or (8).
4. The delegate refused to grant the visa on the basis that the applicant did not meet cl.801.221(1) of Schedule 2 to the Regulations. The delegate assessed the application according to the provisions of cl.801.221(2), finding it to be the only subclause relevant to [the applicant's] circumstances. The primary decision notes that the delegate conducted a telephone interview with [the applicant], via a Vietnamese interpreter, [in] August 2015. In particular, the delegate noted:
 5. You provided evidence of your consultation with [Dr B] regarding your [health] issues, however, during the telephone interview, you stated that you only went to see [the doctor] for a stomach ache, not for [other health] issues. You claimed that your sponsor is also [receiving] treatment, however, no evidence of his treatments has been provided. During the telephone interview, you did not know your engagement or wedding date, and you had little knowledge about your sponsor's employment history. I note that the documentary evidence you have provided does not support the claims you have made about the financial and social aspects of your relationship. All of this places significant doubt on the credibility of the information you have provided and the claims you have made about the genuineness of your relationship.
6. The delegate found that [the applicant] did not meet cl.801.221(2) as the delegate was not satisfied that [the applicant] and [Mr A] were spouses as defined under s.5F of the Act.
7. On 15 October 2015, [the applicant] applied to the Tribunal for review of the primary decision.
8. On 27 September 2016, [the applicant] made a statutory declaration for a family violence claim (Form 1410) which was filed with the Tribunal on 9 November 2016 (along with other documents).
9. Clause 801.221(6)(b) and (c) of Schedule 2 to the Regulations relevantly require that the applicant would meet the requirements of subclause (2) except that the relationship between the applicant and the sponsoring partner has ceased and the applicant has suffered family violence committed by the sponsoring partner (here, [Mr A]). The applicant claims this occurred.
10. On 16 February 2017, [the applicant] appeared before the Tribunal to give evidence and present arguments. The Tribunal also received oral evidence from the applicant's [sister] and from the applicant's [friends].

11. The applicant was represented in relation to the review by her registered migration agent. The representative attended the Tribunal hearing.
12. For the following reasons, the Tribunal has concluded that the decision under review should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

13. The applicant claims the relationship with [Mr A], the visa sponsor, has ceased, and that she has been the victim of family violence. The issue is whether [the applicant] meets cl.801.221(6)(b) and (c) of Schedule 2 to the Regulations.

14. Was the applicant the spouse of the sponsoring partner?

15. Clause 801.221(6)(b) requires that, at the time of this decision, the applicant would meet the requirements of subclause (2) or (2A) except that the relationship between the applicant and the sponsoring partner has ceased. Essentially, the prior existence of a relationship is a precondition to an assessment of family violence.
16. The Tribunal accepts that the parties were married in [an Australian State] [in] July 2012. A certified copy of the registered marriage certificate is on the Department's file. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).

17. Regulation 1.15A(3) factors

18. Regulation 1.15A(3)—extracted in the attachment to this decision—provides relevant factors for determining whether a spousal relationship exists. These factors are (a) the financial aspects of the relationship; (b) the nature of the household; (c) the social aspects of the relationship; and (d) the nature of the person's commitment to each other.
19. In assessing these issues, the Tribunal has had regard to all documents on the Department's and the Tribunal's files as well as the oral evidence given at the hearing.

20. *Section 376 certificate*

21. The Department's file contains a certificate made pursuant to s.376 of the Act. The Tribunal considers that the certificate is invalid. The Department sought to protect the disclosure of a document related to [Mr A's] movement records on the basis that 'disclosure of this material would be contrary to the public interest'. The explanation given was that this regards 'personal information of a third party to the application and the information contained is considered to be in-confidence'. The Tribunal considers this to be a mere description. In the Tribunal's view it could not form the basis for a claim by the Crown in right of the Commonwealth in a judicial proceeding that the matter contained in the document, or the information, should not be disclosed.
22. As the Tribunal considers that the certificate is invalid, the existence of the certificate was not discussed at the hearing and the Tribunal has not given [the applicant] a copy of the certificate.
23. The Tribunal considers that the information the subject of the invalid certificate, while relevant, does not engage the Tribunal's obligations under s.359A of the Act. The records evidence [Mr A] as having departed Australia [in] October 2014 and returned [in a date in] October 2014 (amongst other trips). The Tribunal notes that [the applicant's] movement records—which are on the Tribunal's file—evidence her as having departed and re-entered

Australia on the same dates in October 2014. It appears that the parties departed and re-entered Australia together. Accordingly, this information would not be the reason, or part of the reason, for affirming the decision under review. To the contrary, the information could be regarded as positive evidence that the parties were in a spousal relationship at that time. The Tribunal has given the material the subject of the certificate no negative weight.

24. Information provided to the Tribunal

25. In this review application, [the applicant] has submitted a number of documents, including:
- written submissions dated 2 February 2017;
 - a written statement in support, dated 26 October 2015, but, as advised in the written submissions, this had been updated with 'minor changes to dates and addresses';
 - a private and confidential report from psychologist [Ms C], dated [in] February 2017 identifying 'a number of mental health and language barrier issues which arose' in [the applicant's] departmental interview including the claim that in the circumstances 'it is plausible that she had forgotten details of her engagement, wedding date and [Mr A's] employment history';
 - documents evidencing the financial aspects of the relationship and the nature of the household, including:
 - evidence of the parties' joint bank account with [a bank], being an authority for the business account signed [in] June 2013;
 - statements for the parties' joint business account, addressed to [a business] at an address in [Australian Suburb 1] for the periods [date] June to [date] June 2013 to [date] August 2013;
 - a letter from the Australian Taxation Office to the parties at an address in [Suburb 1], dated [in] June 2013, with respect to the issue of a tax file number;
 - evidence of the social aspects of the relationship, namely:
 - photographs of the parties together with other people in a variety of settings, all with descriptions of the occasions; and
 - documents evidencing [the applicant] and [Mr A's] [health] issues and/or the treatment that they sought prior to the cessation of their relationship:
 - a medical certificate from [a doctor] of [a] Medical Clinic, dated [in] January 2017, stating that the doctor had examined [the applicant] that day and that she is 'suffering from [a medical condition] which caused [difficulty]';
 - a copy of a signed 'to whom it may concern' letter from [Dr B] of [Medical Clinic 1], dated [in] February 2017, with respect to [the applicant's] attendances [in] January 2013 and [in] June 2015 and a referral [in] September 2015;
 - a number of 'progress notes' prepared by [Dr B] in respect of [the applicant], dated [in] January 2013, [date] January 2013, [date] April 2013, [date] June 2015 and [date] August 2015;

- a referral letter from [Medical Clinic 1] to [the hospital], dated [in] September 2015, with respect to [the applicant];
 - a radiologist's report from [an Imaging Centre], dated [in] August 2015, in respect of [the applicant] and concluding that she has [a medical condition];
 - 'appointment order' from [Hospital 1], dated [in] January 2015, in respect of [the applicant] (and signed certification of the translation of the original document from Vietnamese into English);
 - 'outpatient treatment certification', dated [in] October 2015, with respect to [the applicant's] treatment at [Hospital 1] in Ho Chi Minh City, Vietnam [in] January 2015; and
 - a letter from her registered migration agent to the Tribunal, dated 2 March 2017, providing details of the herbalist in Vietnam whom [the applicant] consulted [in] October 2014.
26. [The applicant] also submitted documents with respect to her family violence claim which are detailed and discussed later in this decision.

27. The financial aspects of the relationship

28. Any joint ownership of real estate or other major assets, any joint liabilities, the extent of any pooling of financial resources, whether one person in the relationship owes any legal obligation in respect of the other and the basis of any sharing of day-to-day household expenses are relevant factors to consider when assessing the financial aspects of the relationship.
29. At the hearing, [the applicant] told the Tribunal that she is currently working in her sister's [business] in [a town] and that she had done so for about three years. She said that, when she was first married, she had helped her sister-in-law at her [business]. She said that she was paid in cash so had not put that money into a bank account. She said that, in 2013, after her husband had lost his [job], her sister-in-law had transferred the business to her. She said that she and [Mr A] had worked in the same place for a time. She said that after a while, as she could not manage the business, she transferred it to someone else and stopped working in that business.
30. [The applicant] told the Tribunal that she and [Mr A] had had a joint bank account—a business account—at that time. She thought that they may have opened the account about a month after the business had been transferred into her name. The Tribunal notes the earlier mentioned documentary evidence that has been submitted to the Tribunal which evidences the joint business bank account. The account name shows both parties' names and that they were trading as [business name]. It appears that this account was opened [in] June 2013. The Tribunal notes that the account shows a number of transactions. The Tribunal finds that this is the joint bank account to which [the applicant] referred in her Departmental interview [in] August 2015.
31. When asked about joint assets, [the applicant] said that the business had been the main joint asset. When asked whether they had purchased big items of furniture or electronic goods together, she said that they had both put money towards the purchase of a television for their room.
32. When asked about living expenses, [the applicant] explained that they had lived at her sister's house so had not had to pay rent. She said that they had contributed towards the

bills. The Tribunal notes and accepts the written submission that the parties had no utility bills in their name because they were living with [the applicant's] sister.

33. When asked about financial plans, she said that they had wanted to save money in order to buy a house. When asked whether they had regularly put aside money towards that goal, she said that they had intended to put money aside for a house and that they also put money aside for emergencies. She said that this money was first put into a savings box and then later into an account but the balance never grew. She said that [Mr A] put money into this box too and explained that it had been kept in their bedroom.
34. The Tribunal notes that there is little documentary evidence in support of [the applicant's] claims that, prior to the cessation of the relationship, she and [Mr A] had shared finances and some joint financial plans. Notwithstanding, the Tribunal accepts [the applicant's] oral evidence, because it found her to be a credible witness, and finds that the parties did pool their finances—to some extent.
35. The Tribunal gives some—albeit very little—weight to the evidence of the financial aspects of the relationship.

36. *The nature of the household*

37. Any joint responsibility for the care and support of children, the living arrangements of the persons and any sharing of the responsibility for housework are the three matters to be considered when assessing the nature of the household.
38. As noted earlier, in the primary decision, the delegate considered there to be a lack of evidence about the parties' [health] issues and related treatment. The delegate found that [the applicant] had provided false and misleading information in relation to her consultation with [Dr B] regarding [health] issues because, in the telephone interview, she had twice said that she had seen [Dr B] due to [an ailment] and not for [other health] issues. Accordingly, the delegate gave little weight to the evidence that the parties had provided in support of their claims about the nature of their household and was not satisfied that the parties lived together as a genuinely married couple.
39. The Tribunal notes that the written submissions go into some detail to explain the information and evidence about [the applicant's] [health] issues and treatment sought. The Tribunal has also had the benefit of being provided with greater medical evidence than what was provided to the delegate. Key amongst this evidence is the 'to whom it may concern' letter from [Dr B] dated [in] February 2017 which summarises matters. In that letter [Dr B] stated:

40. I am writing to confirm that [in] January 2013, [the applicant] came to my clinic with her then-husband, [Mr A].

41. [The applicant was presented with [an ailment]. Her [health] test was negative. She was ordered to have [tests].

42. [In June 2015], [the applicant and Mr A] came to see me for issue of [a health issue]. Tests for this reason were ordered.

43. After all the results were back, I have referred them to [a department] at [a hospital] [in] 09/2015.

44. The Tribunal notes that copies of [Dr B's] progress notes with respect to [the applicant's] attendances at [Medical Clinic 1] were also provided as well as a copy of his referral [letter]. The Tribunal accepts this evidence and the facts stated therein.

45. Further, after the hearing, [the applicant's] representative wrote a letter to the Tribunal, dated 2 March 2017, which relevantly provides:

46. Further to the Hearing of this matter we confirm that our client attended a herbalist in Vietnam [in] October 2014 [in] order to address her [health] problem as previously advised. The name of the herbalist was [name] and his address is ... Ho Chi Minh City Vietnam. We have previously confirmed that our client did attend. Her response during the telephone interview with the Department was as a result of nervousness and the reasons covered in the Psychologist['s] letter of [Ms C] previously provided.

47. The Tribunal has reviewed and considered the information and additional evidence provided to the Tribunal and accepts the claims made.
48. Accordingly, the Tribunal does not share the delegate's concerns about [the applicant's] credibility and does not consider there to be a lack of evidence about [the applicant] and [Mr A's] [health] issues and the treatment that they sought prior to the cessation of their relationship.
49. In this review, the Tribunal notes that there is no evidence of any joint responsibility for the care and support of children.
50. [The applicant] told the Tribunal that she was currently living at a property in [Suburb 1] — with her sister and her sister's son—and that [Mr A's] had also previously lived at the house. She could not recall the exact date that [Mr A] had moved into the house but thought that it was before the wedding. [The applicant] gave oral evidence that [Mr A] moved out in August 2015. She also told the Tribunal that they had lived together when [Mr A] had travelled to Vietnam to visit her.
51. The Tribunal notes the documentary evidence which is on both the Department's and the Tribunal's files which corroborates the claim that, prior to the cessation of the relationship, the parties had lived together at the property in [Suburb 1].
52. With respect to responsibility for housework, the Tribunal notes that in [the applicant's] statutory declaration of 29 March 2015, she had stated:

53. everyday we cook together and eat together. We went shopping together and seems to be inseparable. For household work, [Mr A] clean up the toilet and kitchen, I clean the living room and bedroom. [Mr A] empties the rubbish bin everyweek. I do the bed sheets and do the washing while [Mr A] helps me to put clothes outside for natural drying. I'll do the ironing for both of us.

54. [Mr A] had given broadly consistent evidence in his statutory declaration made on the same day.
55. However, at the hearing, [the applicant] told the Tribunal that when she and [Mr A] had lived together that her sister had cooked but if she could not cook for some reason, that then [Mr A] would cook. [The applicant] said that she did the cleaning for the whole house and that [Mr A] did the bins and outside jobs. The Tribunal does not view these minor discrepancies as constituting a reason, or part of the reason, for affirming the decision under review. The Tribunal notes that, at the hearing, it asked [the applicant's sister] questions about the responsibility for household chores when [Mr A] had been living at the house. She said that there had been no clear division as to cleaning and that they had all simply done what needed to be done. She said that she had done most of the cooking because she had a child but she noted that if [the applicant] and [Mr A] had wanted to eat some particular food

that they would cook for themselves. The Tribunal accepts [the applicant's] and [the applicant sister's] oral evidence.

56. The Tribunal places some weight on the evidence of the nature of the household.

57. *The social aspects of the relationship*

58. Whether the persons represent themselves to other people as being married to each other, the opinion of the persons' friends and acquaintances about the nature of the relationship and any basis on which the persons plan and undertake joint social activities are relevant matters to be considered in determining the social aspects of the relationship.
59. The Tribunal notes that the delegate had been critical of the fact that the photographs that had been submitted to the Department did not have accompanying descriptions of the occasions and the dates. [The applicant] has sought to rectify this in the photographs submitted to the Tribunal. Two photographs show the parties both working at [the business]. These photographs are undated. One photograph shows the parties together in [a suburb] together with members of [the applicant's] family, including her parents. This photograph was said to have been taken in April 2013. Four photographs were submitted from the parties' trip to Vietnam in October 2014. These photographs appear to have been taken on different occasions and show the parties with various friends and [the applicant's] family members. Two other photographs were said to have been taken in 2015. One was said to have been taken in February 2015 at a joint birthday party for [the applicant] and [Mr A's] sister and the other was said to have been taken in March 2015 at the birthday party for [Mr A's] mother. The Tribunal has no reason to doubt the claims made.
60. At the hearing, the Tribunal had the benefit of hearing oral evidence about the social aspects of the parties' former relationship from three witnesses: [The applicant's] [sister] (who had earlier made a Form 888 statutory declaration [in] March 2015), [two other witnesses]. All witnesses had known the parties for many years and were aware of the marriage. The Tribunal found that their reasons for considering that, prior to the cessation of the relationship, [the applicant] and [Mr A's] relationship had been a genuine one were well considered and detailed.
61. The Tribunal also notes and gives weight to the evidence of the trip to Vietnam and a holiday to [an Australian state] that the couple had taken together.
62. From the oral and documentary evidence before it, the Tribunal accepts that, prior to the cessation of their relationship, [the applicant] and [Mr A] represented themselves socially to their families and to their friends as a married couple.
63. In view of the evidence before the Tribunal, the Tribunal places great weight on the social and public recognition of the relationship.
64. *The nature of the person's commitment to each other*
65. The duration of the relationship, the length of time during which the persons have lived together, the degree of companionship and emotional support that the persons draw from each other, and whether the persons see their relationship as long-term are all aspects to be considered in determining the nature of the person's commitment to each other.
66. The Tribunal has taken into account the parties' respective ages, backgrounds and life experiences. The evidence before the Tribunal is that the parties were in an exclusive and committed relationship for a number of years, having first met in person in April 2011 and married [in] July 2012.

67. The Tribunal found [the applicant] to be a credible witness. Her evidence about the inception and development of the relationship—both in her statutory declaration made [in] September 2012 and in her oral evidence at the hearing—was detailed and broadly consistent.
68. The Tribunal gives weight to the evidence that the couple lived together for around three years and two months (noting that [the applicant] said that they had started living together prior to their marriage [in] July 2012 and that [Mr A] had moved out in August 2015). Further, they have been married for about five and a half years, although separated since August 2015.
69. The Tribunal considers that the parties had viewed their relationship as long term, prior to the cessation of the relationship. In this respect, the Tribunal gives particular weight to the evidence that [the applicant] had been pursuing treatment—in the words of her former migration agent, ‘both traditional and modern medicines’—in order to address her [health] issues, with the view to starting a family with [Mr A]. The evidence before the Tribunal supports the conclusion that, prior to the cessation of their relationship, the parties saw their relationship as being for the long term.
70. The Tribunal places some weight on the evidence of the nature of each person’s commitment to the other—prior to the cessation of the relationship.

71. *Conclusion*

72. As stated above, the Tribunal is satisfied that the parties were validly married, as required by s.5F(2)(a) of the Act.
73. On the basis of the evidence considered as a whole, and for the reasons given with respect to the r.1.15A(3) matters, the Tribunal is satisfied that, prior to the cessation of the relationship, [Mr A] and [the applicant]:
- had a mutual commitment to a shared life as husband and wife to the exclusion of all others, as required by s.5F(2)(b) of the Act;
 - had a genuine and continuing relationship, as required by s.5F(2)(c) of the Act; and
 - were living together, as required by s.5F(2)(d)(i) of the Act.
74. The Tribunal notes that the social worker, [Ms D], stated in her report that the parties had divorced [in] July 2016. However, there is no other evidence before the Tribunal that either party has applied for a divorce or that a divorce has been obtained. Notwithstanding, the Tribunal is satisfied that the relationship ceased in August 2015.
75. On the basis of the evidence, the Tribunal is satisfied that the applicant and the sponsor were in a partner relationship and that this relationship has ceased. The Tribunal finds that cl.801.221(6)(b) is established.
76. The next issue is whether the applicant has suffered family violence committed by the sponsor, within the meaning of the Regulations.
- HAS A CLAIM OF FAMILY VIOLENCE BEEN MADE UNDER THE REGULATIONS?**
77. Clause 801.221(6)(c) requires, amongst other possibilities, that the applicant has suffered family violence committed by the sponsoring partner.

78. Under r.1.23 of the Regulations, a person is taken to have suffered or committed family violence if there is evidence tested before a court; or the visa application includes a non-judicially determined claim of family violence, and either the Minister (or the Tribunal on review) is satisfied that the alleged victim has suffered relevant family violence or an opinion of an independent expert has been given that the alleged victim has suffered relevant family violence.
79. Relevant family violence is defined in r.1.21. The violence, or part of the violence, must have occurred during the relationship: r.1.23(3), (5), (7), (12), (14).
80. The regulations relevant to this decision are extracted in the attachment to this decision.
81. The applicant is seeking to establish family violence on the basis of a non-judicially determined claim of family violence.
82. Under r.1.23, a visa application is taken to include a non-judicially determined claim of family violence where, either: a joint undertaking to a court has been made by the alleged victim and alleged perpetrator or evidence in accordance with r.1.24 is provided.
83. The applicant in this case is seeking to rely on evidence referred to in r.1.24—namely, a statutory declaration under r.1.25 and evidence of a type and number specified by the Minister for these purposes (see Legislative Instrument IMMI 12/116).
84. The Tribunal notes that [the applicant] submitted the following documents to the Tribunal in respect of her claim of family violence:
- her statutory declaration for a family violence claim (Form 1410) of 27 September 2016;
 - a statutory declaration for a family violence claim (Form 1410) made by [Ms C] [in] September 2016—the accompanying cover letter from [the applicant's] representative explained that psychologist [Ms C] 'was the one who took instructions from our client';
 - a statutory declaration of her psychologist, [Ms C], made [in] November 2015 referring to an assessment report she had dated [in] November 2015 with respect to [the applicant];
 - a copy of [Ms C's] assessment report dated [in] November 2015.
 - a copy of [Ms C's] psychological report dated [in] October 2016;
 - a copy of [Ms C's] professional profile on LinkedIn;
 - a statutory declaration of her psychologist, [Dr E], made [in] February 2017 referring to an assessment report she had dated [in] January 2016 with respect to [the applicant];
 - a copy of [Dr E's] psychological assessment report dated [in] January 2016;
 - a copy of [Dr E's] business card and a copy of her professional profile from a website;

- a statutory declaration of her social worker, [Ms D], made [in] November 2016 referring to an assessment report she had made [in] September 2016 with respect to [the applicant]; and
- a copy of [Ms D's] cover letter dated [in] September 2016 and the signed assessment report with respect to [the applicant].

85. (The Tribunal also notes that [the applicant] submitted a certified copy of [Ms D's] cover letter dated [in] September 2016, along with an earlier, unsigned version of the assessment report with respect to [the applicant]).

86. *Consideration of [the applicant's] statutory declaration [in] September 2016*

87. A statutory declaration under r.1.25 must be made by the spouse or de facto partner of the alleged perpetrator: r.1.25(1). If the alleged victim is the spouse or de facto partner, the statutory declaration must set out the allegation of family violence, name the person alleged to have committed the relevant family violence: r.1.25(2).

88. The Tribunal finds that [the applicant's] statutory declaration [in] September 2016 meets the requirements of r.1.25(1) and (2).

89. *Consideration of evidence specified in the applicable legislative instrument*

90. Legislative Instrument IMMI 12/116 specifies a minimum of two items of evidence from a list in the Schedule to the instrument and that not more than one of each type may be presented. Two of the items listed are:

- a statutory declaration made by a registered psychologist in a State or Territory who has treated the alleged victim while performing the duties of a psychologist; and
- a statutory declaration made by a member of the Australian Association of Social Workers or a person who is eligible to be a member of that Association, and in both cases, that declarant has provided counselling or assistance to the alleged victim while performing the duties of a social worker.

91. This instrument requires that the relevant psychologist's statutory declaration and the relevant social worker's statutory declaration must each: state that, in their opinion, the alleged victim was subject to family violence; detail the reasons for that opinion; and identify the alleged perpetrator.

92. *Consideration of the psychologists' evidence*

93. It is unclear which of the two psychologists' statutory declarations [the applicant] wishes the Tribunal to consider for the purpose of considering the requirements of the schedule to the instrument.

94. The Tribunal notes that [Dr E] met with [the applicant] on one occasion: [November] 2015. By contrast, [Ms C's] psychological report [in] November 2015 states that she met with [the applicant] on multiple occasions: [date] May 2013 (one hour), [date] June 2013 (one hour), [date] July 2013 (one hour), [date] October 2015 (one hour), [date] October 2015 (one hour), [date] October (one hour), [date] October (1 hour) and [date] November (3 hours). In view of [Ms C's] more extensive treatment of [the applicant], the Tribunal has decided to assess her statutory declaration of [November] 2015, together with her signed assessment report made on the same day, against the requirements of the schedule to the instrument.

95. (As will be noted below, [Dr E's] statutory declaration made [in] January 2016, together with her psychological assessment report made on that same day, have been of assistance to the Tribunal when considering whether [the applicant] has suffered family violence).
96. The Tribunal accepts that, at the time of making her statutory declaration [in] November 2015, [Ms C] was a registered psychologist working in the state of [State]. The Tribunal notes the dates and duration of time over which [Ms C] counselled [the applicant] and finds that [Ms C] treated [the applicant] while performing the duties of a psychologist.
97. The Tribunal finds that [Ms C's] statutory declaration fulfils the requirements pertaining to mandatory details. [Ms C] identified the alleged perpetrator as [Mr A]. She outlined, amongst other things, the 'marriage problems', the 'domestic violence and sexual assault' and the 'physical violence'. She concluded that '[The applicant's] presenting emotional, psychological and physical disturbances since the traumatic marital experiences have adversely impacted on her daily functioning and quality of life' and that '[The applicant] had demonstrated to be a committed and loyal wife to her husband in spite of his neglect, aggression and violence'. In the Tribunal's opinion, these statements constitute [Ms C's] statement of her opinion that [the applicant] was subject to family violence. She also details the reasons why she reached this conclusion, as she gives a detailed account of the instructions given during the sessions and [the applicant's] symptoms resulting from the alleged abuse.
98. [Ms C's] statutory declaration made [in] November 2015, together with her signed assessment report, fulfil the requirements.

99. *Consideration of [Ms D's] evidence*

100. The Tribunal accepts that, at the time of making her statutory declaration [in] November 2016, [Ms D] was a member of the Australian Association of Social Workers or a person who was eligible to be a member of that Association. The Tribunal makes this finding because in her cover letters, [Ms D] explained that she was 'a qualified Social Worker, Couple and Family Therapist with over 30 years of experience in the health and welfare field'. Further, at the time of this decision, the Tribunal has reviewed the website for the Australian Association of Social Workers and has found that [Ms D] is listed there as a Social Worker.
101. The Tribunal notes that, from the information before the Tribunal, [Ms D] met with [the applicant] on one occasion: [August] 2016.
102. The Tribunal is aware of the Federal Circuit Court's decision in *Dang v Minister for Immigration* [2016] FCCA 1426 (Judge McNab, 30 June 2016), which considered the specification of evidentiary requirements in the instrument. The Court said, at [29], '[i]f the evidentiary requirements were satisfied simply by a statutory declaration made by a registered psychologist, who is a non-treating psychologist, the words in relation to treatment would be otiose'. The Court approved of the Tribunal's conclusion, in that case, that in order to meet the requirements of the instrument, 'the relationship between the Applicant and the psychologist or social worker must have been essentially a therapeutic one'.
103. [Sentence deleted.]
104. Despite some similarities, the Tribunal considers that the facts in the present case are distinguishable from the facts before the Tribunal in the review that subsequently led to the Federal Circuit Court's consideration in *Dang*. There the Court remarked:

105. It is apparent from the evidence that was provided by both of Mr Clifopoulos and Ms Podbury to the Tribunal, that neither of those persons were in a therapeutic relationship with the Applicant. ... In relation to Ms Podbury, the Tribunal held at [25]:

106. ... In the case of her statutory declaration the evidence does not indicate that she has provided counselling or assistance to Mr Dang. Mr Dang told the Tribunal that he saw her once for no more than three hours earlier in the month of the hearing. ...

107. Further, at [25] the Tribunal stated:

108. ... Asked by the Tribunal whether Ms Podbury provided any counselling or assistance to him, Mr Dang paused before saying that they talked but that he could not remember.

109. Unlike that case, the Tribunal finds that [Ms D] counselled or assisted [the applicant] while performing the duties of a social worker. In forming this view, the Tribunal has been mindful of sources that were provided to the Tribunal (as presently constituted) in another matter, which it was said 'confirm that one session can constitute a therapeutic relationship, as it is up to the individual as to how many sessions they require in order to feel an improvement'.
110. The Tribunal finds that [Ms D's] statutory declaration, together with her signed assessment report, fulfils the requirements pertaining to mandatory details. In [Ms D's] assessment report, she outlined [the applicant's] 'experiences of abuse', including 'incidence[s] of physical violence'. [Ms D] identified the alleged perpetrator as [Mr A]. She concluded by stating that, in her professional opinion, '[The applicant's] circumstances and the evidence provided shows that there has been threatened and actual family violence as defined by the Regulations'.
111. [Ms D's] statutory declaration made [in] November 2016, together with her signed assessment report, fulfil the requirements.
112. In conclusion, the Tribunal finds that the evidence presented meets the requirements of r.1.24. As such, a non-judicially determined claim of family violence has been made under r.1.23.

HAS THE APPLICANT SUFFERED FAMILY VIOLENCE?

113. Form 1410 (which is a statutory declaration for a family violence claim) asks declarants to describe the relevant family violence that they have experienced, including dates of individual incidents and the frequency of the violence. In her statutory declaration made on this form on 27 September 2016, in response to this prompt, [the applicant] stated:
- In May 2013, [Mr A] was upset and angry at me when I happily greeted a male customer at our [shop]. He insulted me and threatened me. When we got home, he violently pulled my wrist and pushed me to the floor. I was hurt and frightened.
 - Around August 2014, [Mr A] became impatient that I couldn't fall pregnant. I felt a lot of pressure from him and his family. I felt rejected and scared when he threatened to find someone else if I could not have a baby.
 - Early November 2014, [Mr A] was frequently away drinking and socialising without me. I felt lonely, homeless and helpless.
 - In July 2015, I found out through friends that they have seen him with another woman. I felt despair and was having thoughts of dying as living this way was very painful.

- Approx[imately at the] end of August 2015, he came home and took most of his belongings and admitted that he had found someone else and was moving in with her.
- Early October 2015, I found out that [Mr A] and his girlfriend had a baby girl.

114. Earlier in the declaration she stated that:

- Towards the end of our marriage, [Mr A] was very abusive verbally, emotionally and physically.
- He frequently yelled and swore at me.
- He pushed, shoved me and forcefully pulled my wrist; I got hurt and bruised.
- He threatened me not to disclose/talk to anyone.
- He often insulted me as I was unable to have a baby.

115. At the hearing, [the applicant] gave broadly consistent evidence about these violent incidents. She said that [Mr A's] behaviour towards her started to change after he lost his job [in] around December 2012. [The applicant] said that [Mr A] started to binge drink alcohol at this time and was verbally abusive towards her. [The applicant] said that when he was drinking, that if she did not do what he wanted, that he would pull her hand hard and that that had hurt her. The Tribunal is mindful that [the applicant] has a physical job where she needs to use her hands to perform [her work]. She told the Tribunal that it was difficult for her to perform her tasks well if her hand was sore.

116. [The applicant] said that after he lost his job, [Mr A] started working for his sister and that later [Mr A's] sister transferred the [business] to her and that she had hoped that this would improve their relationship. However, when they were working together, [Mr A] became controlling of [the applicant]. She recounted an incident where she had [provided service for] a male client and that it had been part of her job to be welcoming and friendly to clients but that [Mr A] had become upset and verbally abused her for her interaction with the male client. When they were driving home, he continued to scold her and he drove erratically, ignoring some road work signs, which frightened her. She said that the next day, [Mr A] stayed away for the whole evening.

117. She said that she started having nightmares, so she saw her General Practitioner and was referred to a psychologist.

118. [The applicant] explained that she saw the psychologist three times in 2013 (which the Tribunal notes is corroborated by [Ms C's] report) but then she stopped because she was worried about [Mr A's] attitude. She explained that she tried to maintain the relationship and tried to stop thinking negatively about [Mr A] and tried to reason with him. She said that by the end of 2013, their [business] had not done well so they transferred it to another person.

119. [The applicant] said that she then started working for someone else but that [Mr A] did not work and would binge drink alcohol with his friends. He would return home in the evenings and abuse her, including telling her that she did not earn sufficient income.

120. [The applicant] recounted memorable incidents such as the time she locked herself into the bedroom for three days and [Mr A] ignored her; the time he grabbed her and pulled her up by her wrist; the time he said that he wanted to have sexual intercourse with her but as she had been working all day and was tired, that she had refused but that he had insisted and

had threatened that if she did not comply with his desires that he would withdraw his sponsorship of her visa and that she had not been able to resist his physical force and that he had been so sexually violent towards her that she had been hurt by the incident.

121. The Tribunal notes that the two psychologists and the social worker recount [the applicant] as having told them similar information about these various events. The Tribunal gives weight to these declarations.
122. Having considered all of the evidence before it, the Tribunal is satisfied, for the purposes of r.1.23, that the applicant has suffered family violence committed by the sponsor that occurred while the parties were in the relationship. The Tribunal was satisfied of the family violence without needing an Independent Expert Opinion. As such, the applicant is taken to have suffered family violence in the relevant sense: r.1.22.
123. Accordingly, the Tribunal finds that the applicant is taken to have suffered family violence committed by the sponsor for r.1.22.
124. As the relationship between the applicant and sponsor has ceased, and the applicant has suffered relevant family violence committed by the sponsor, the applicant meets the requirements of cl.801.221(6)(b) and (c). Given these findings, the appropriate course is to remit the visa application to the Minister to consider the remaining criteria for the visa.

DECISION

125. The Tribunal remits the application for a Partner (Residence) (Class BS) visa for reconsideration, with the direction that the applicant meets the following criteria for a Subclass 801 visa:
 - cl.801.221(6)(b) and (c) of Schedule 2 to the Regulations.

Justine Clarke
Member

126.

127.

ATTACHMENT – EXTRACTS FROM THE MIGRATION REGULATIONS 1994

1.15A SPOUSE

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).
- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).

...

1.21 Interpretation

In this Division:

independent expert means a person who:

- (a) is suitably qualified to make independent assessments of non-judicially determined claims of family violence; and
- (b) is employed by, or contracted to provide services to, an organisation that is specified, in a legislative instrument made by the Minister, for the purpose of making independent assessments of non-judicially determined claims of family violence.

non-judicially determined claim of family violence has the meaning given by subregulations 1.23(8) and (9).

relevant family violence means conduct, whether actual or threatened, towards:

- (a) the alleged victim; or
- (b) a member of the family unit of the alleged victim; or
- (c) a member of the family unit of the alleged perpetrator; or
- (d) the property of the alleged victim; or
- (e) the property of a member of the family unit of the alleged victim; or
- (f) the property of a member of the family unit of the alleged perpetrator;

that causes the alleged victim to reasonably fear for, or to be reasonably apprehensive about, his or her own wellbeing or safety.

statutory declaration means a statutory declaration under the *Statutory Declarations Act 1959*.

violence includes a threat of violence.

...

1.23 When is a person taken to have suffered or committed family violence?

- (1) For these Regulations, this regulation explains when:
 - (a) a person (the alleged victim) is taken to have suffered family violence; and
 - (b) another person (the alleged perpetrator) is taken to have committed family violence in relation to the alleged victim.

Note Schedule 2 sets out which visas may be granted on the basis of a person having suffered family violence. The criteria to be satisfied for the visa to be granted set out which persons may be taken to have suffered family violence, and how those persons are related to the spouse or de facto partner of the alleged perpetrator mentioned in this regulation.

Circumstances in which family violence is suffered and committed — injunction under Family Law Act 1975

- (2) The alleged victim is taken to have suffered family violence, and the alleged perpetrator is taken to have committed family violence, if, on the application of the alleged victim, a court has granted an injunction under paragraph 114(1)(a), (b) or (c) of the Family Law Act 1975 against the alleged perpetrator.
- (3) For subregulation (2), the violence, or part of the violence, that led to the granting of the injunction must have occurred while the married relationship between the alleged perpetrator and the spouse of the alleged perpetrator existed.

Circumstances in which family violence is suffered and committed — court order

- (4) The alleged victim is taken to have suffered family violence, and the alleged perpetrator is taken to have committed family violence, if:
 - (a) a court has made an order under a law of a State or Territory against the alleged perpetrator for the protection of the alleged victim from violence; and
 - (b) [...] order was made after the court had given the alleged perpetrator an opportunity to be heard, or otherwise to make submissions to the court, in relation to the matter.
- (5) For subregulation (4), the violence, or part of the violence, that led to the granting of the order must have occurred while the married relationship or de facto relationship existed between the alleged perpetrator and the spouse or de facto partner of the alleged perpetrator.

Circumstances in which family violence is suffered and committed — conviction

- (6) The alleged victim is taken to have suffered family violence, and the alleged perpetrator is taken to have committed family violence, if a court has:
 - (a) convicted the alleged perpetrator of an offence of violence against the alleged victim; or
 - (b) recorded a finding of guilt against the alleged perpetrator in respect of an offence of violence against the alleged victim.

- (7) For subregulation (6), the violence, or part of the violence, that led to the conviction or recording of a finding of guilt must have occurred while the married relationship or de facto relationship existed between the alleged perpetrator and the spouse or de facto partner of the alleged perpetrator.

Circumstances in which family violence is suffered and committed — non-judicially determined claim of family violence

- (8) For these Regulations, an application for a visa is taken to include a non-judicially determined claim of family violence if:
- (a) the applicant seeks to satisfy a prescribed criterion that the applicant, or another person mentioned in the criterion, has suffered family violence; and
 - (b) the alleged victim and the alleged perpetrator have made a joint undertaking to a court in relation to proceedings in which an allegation is before the court that the alleged perpetrator has committed an act of violence against the alleged victim.
- (9) For these Regulations, an application for a visa is taken to include a non-judicially determined claim of family violence if:
- (a) the applicant seeks to satisfy a prescribed criterion that the applicant, or another person mentioned in the criterion, has suffered family violence; and
 - (b) the alleged victim is:
 - (i) a spouse or de facto partner of the alleged perpetrator; or
 - (ii) a dependent child of:
 - (A) the alleged perpetrator; or
 - (B) the spouse or de facto partner of the alleged perpetrator; or
 - (C) both the alleged perpetrator and his or her spouse or de facto partner; or
 - (iii) a member of the family unit of a spouse or de facto partner of the alleged perpetrator (being a member of the family unit who has made a combined application for a visa with the spouse or de facto partner); and
 - (c) the alleged victim or another person on the alleged victim's behalf has presented evidence in accordance with regulation 1.24 that:
 - (i) the alleged victim has suffered relevant family violence; and
 - (ii) the alleged perpetrator committed that relevant family violence.
- (10) If an application for a visa includes a non-judicially determined claim of family violence:
- (a) the Minister must consider whether the alleged victim has suffered relevant family violence; and
 - (b) if the Minister is satisfied that the alleged victim has suffered the relevant family violence, the Minister must consider the application on that basis; and
 - (c) if the Minister is not satisfied that the alleged victim has suffered the relevant family violence:
 - (i) the Minister must seek the opinion of an independent expert about whether the alleged victim has suffered the relevant family violence; and
 - (ii) the Minister must take an independent expert's opinion on the matter to be correct for the purposes of deciding whether the alleged victim satisfies a prescribed criterion for a visa that requires the applicant for the visa, or another person mentioned in the criterion, to have suffered family violence.
- (11) The alleged victim is taken to have suffered family violence, and the alleged perpetrator is taken to have committed family violence, if:
- (a) an application for a visa includes a non-judicially determined claim of family violence; and
 - (b) the Minister is satisfied under paragraph (10)(b) that the alleged victim has suffered relevant family violence.
- (12) For subregulation (11), the Minister must be satisfied that the relevant family violence, or part of the relevant family violence, occurred while the married relationship or de facto relationship existed between the alleged perpetrator and the spouse or de facto partner of the alleged perpetrator.
- (13) The alleged victim is taken to have suffered family violence, and the alleged perpetrator is taken to have committed family violence, if:
- (a) an application for a visa includes a non-judicially determined claim of family violence; and
 - (b) the Minister is required by subparagraph (10)(c)(ii) to take as correct an opinion of an independent expert that the alleged victim has suffered relevant family violence.

- (14) For subregulation (13), the violence, or part of the violence, that led to the independent expert having the opinion that the alleged victim has suffered relevant family violence must have occurred while the married relationship or de facto relationship existed between the alleged perpetrator and the spouse or de facto partner of the alleged perpetrator.